

EXHIBIT D

In The Matter Of:

*Eli Mistovich, Jr. v.
Elizabeth Bowden, et al.*

*Stephen Urban, Jr.
Vol. 1, September 14, 2005*

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<p style="text-align: right;">Page 4</p> <p>[1] DIRECT EXAMINATION [2] BY MR. TEAGUE: [3] Q: Good morning, Mr. Urban. My name is Frank [4] Teague, and I represent Eli Mistovich, the Plaintiff [5] in this case. You're accompanied by counsel, [6] Attorney Rubin. I'll be asking you some questions. [7] Just a couple of ground rules in depositions. I'd [8] appreciate it if you'd let me finish the question [9] before you start your answer. People tend to try to [10] answer before we finish, but the stenographer has to [11] take everything down. And if you answer "yes" or [12] "no," just say "yes" or "no" rather than nodding [13] your head so that the record may reflect your [14] answer. And if you want to take a break at any [15] time, confer with counsel, just so state. Okay? [16] Would you state your name for the record. [17] A: Stephen Urban, Jr. [18] Q: And what's your home address? [19] A: 25 Townhouse Road, Attleboro, Mass. [20] Q: And how old are you? [21] A: Fifty-two years old. [22] Q: And are you married? [23] A: Yes, I am. [24] Q: Children?</p>	<p style="text-align: right;">Page 6</p> <p>[1] A: In that role I serve as the chief operating [2] officer. I'm responsible for the day-to-day [3] operation with district responsibility for the [4] engineering and mechanical departments. [5] Q: And who's your immediate supervisor? [6] A: Kevin Lydon. [7] Q: And what's his position? [8] A: General manager. [9] Q: And how long have you worked for MBCR? [10] A: Since May of 2003. [11] Q: And MBCR, is that a public-owned company, [12] if you know? [13] A: I'm not quite sure when you say [14] "public-owned." [15] Q: Do you know if MBCR is a corporation? [16] A: Yes, it is, but it does not have [17] public-traded stock, if that's what you mean. [18] Q: My inquiry is based on the nature of the [19] entity, just for the record. [20] A: It's a limited liability corporation. [21] Q: Do you know who owns the company? [22] A: It is owned by three separate corporations: [23] Connex North America, which has a 60 percent share; [24] Bombardier has a 20 percent share, and Alternative</p>
<p style="text-align: right;">Page 5</p> <p>[1] A: Two. [2] Q: And are you a high school graduate? [3] A: Yes, I am. [4] Q: And any post high school education? [5] A: Rutgers University. [6] Q: And did you graduate from Rutgers? [7] A: No, I didn't. [8] Q: Okay. Now, are you presently employed by [9] the Massachusetts Bay Commuter Railroad Company? [10] A: Yes, I am. [11] Q: I'll refer to that as "MBCR." [12] A: Correct. [13] Q: Okay. And would you describe for the [14] record what is the business of MBCR. [15] A: We operate the commuter rail service in [16] Eastern Massachusetts under contract with the MBTA. [17] Q: And how long has MBCR operated the commuter [18] rail service under the MBTA contract? [19] A: Since July 1st, 2003. [20] Q: And is that the only business of MBCR? [21] A: Yes, it is. [22] Q: And what's your position at MBCR? [23] A: Deputy general manager. [24] Q: And what are the duties of that position?</p>	<p style="text-align: right;">Page 7</p> <p>[1] Concepts has a 20 percent share. [2] Q: And how long have you been deputy general [3] manager? [4] A: Since January of 2004. [5] Q: And what's your position — strike that. [6] Did you work for MBCR prior to January [7] 2004? [8] A: Yes, I did. [9] Q: And what was your position before January [10] of 2004? [11] A: I was the assistant manager of [12] transportation. [13] Q: And did you have any other jobs at MBCR [14] other than the two that you mentioned? [15] A: No, sir. [16] Q: Okay. Now, where did you work immediately [17] before you went to work for MBCR? [18] A: I worked for Amtrak. [19] Q: Okay. And over approximately what time [20] period did you work for Amtrak? [21] A: Since 1976. [22] Q: So from '76 to — 1976 to 2003 you worked [23] for Amtrak? [24] A: That is correct.</p>

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[1] A: Mr. Mistovich served as the interview
[2] officer for hiring track employees.
[3] Q: And for the record what are track
[4] employees?
[5] A: Those — that class of employees that
[6] install and maintain the track infrastructure.
[7] Q: Were you in a supervisory position to Mr.
[8] Mistovich?
[9] A: As the deputy general manager, I did have
[10] overall responsibility for the Engineering
[11] Department, but there was a layer between Mr.
[12] Mistovich and myself, which would have been the
[13] chief engineer.
[14] Q: And was that Mr. Nevero, Stephen Nevero?
[15] A: Yes.
[16] Q: So Mr. Nevero would be considered Mr.
[17] Mistovich's immediate supervisor?
[18] A: Yes, sir.
[19] Q: Other than his work at Amtrak, did you have
[20] any understanding of Mr. Mistovich's employment
[21] background before he came to work for MBCR?
[22] A: Well, I knew that he had worked in the
[23] Track Department and was a track supervisor.
[24] Q: Do you know how long he had worked for

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[1] Amtrak?
[2] A: Many years but I don't know specifically.
[3] Q: Now, when you said MBCR started operating
[4] the commuter rail service for the MBTA in July of
[5] 2003 —
[6] A: Yes.
[7] Q: — was that pursuant to a bidding process
[8] where a contract was awarded?
[9] A: Yes, it was.
[10] Q: Okay. Now, when — was MBCR organized
[11] specifically to bid on this MBTA contract?
[12] A: Yes, it was.
[13] Q: Once the contract was awarded, how did MBCR
[14] go about finding employees to perform the services
[15] that were necessary?
[16] A: As part of the operating agreement with the
[17] MBTA, MBCR was required to take all the existing
[18] Amtrak commuter rail employees that were employed as
[19] of I believe it was March 2002. If you were an
[20] active employee on that date, you were guaranteed
[21] employment with MBCR, and that included both union
[22] employees as well as salaried employees up to a
[23] certain level.
[24] Q: Okay. Approximately how many employees

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[1] does MBCR have at the present time, if you know?
[2] A: About 1,760.
[3] Q: And has that — is that an increase —
[4] well, strike that.
[5] Back in 2003 when — after the contract was
[6] awarded and MBCR first started operating, do you
[7] know how many employees they started with?
[8] A: It was over 1,600, and subsequently we've
[9] hired more than 100 new employees.
[10] Q: Okay. So if my understanding is correct,
[11] pursuant to that agreement MBCR took on all the
[12] Amtrak employees?
[13] A: Yes.
[14] Q: Do you know if there was any reviewing
[15] process by MBCR going over each employee's records?
[16] A: Not to the extent that an MBCR-hired
[17] employee is subjected to today. We took over the
[18] workforce virtually intact.
[19] Q: Okay. So there was no individual review of
[20] each employee, I take it?
[21] A: No, that is a correct statement.
[22] Q: Did MBCR have access to the employee's
[23] personnel files at Amtrak?
[24] A: The only information that was conveyed from

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[1] Amtrak was original date of hire, the basic
[2] personnel information such as age and current
[3] address, dependent status. The discipline records
[4] that were accrued under Amtrak did not come over
[5] unless it involved anything that was federally
[6] mandated under the Federal Railroad Administration
[7] or incidents involving drugs and alcohol.
[8] Q: Were any background checks done on the
[9] individual employees; do you know?
[10] A: Not those that came over.
[11] Q: Okay. Did the — how about the salary and
[12] the benefits of employees, did they change at all in
[13] that transition?
[14] A: Yes, they did.
[15] Q: And how did they change?
[16] A: For the unionized employees there was a
[17] five-year negotiated labor agreement, and for the
[18] salaried employees they all received a five percent
[19] across-the-board wage increase.
[20] Q: Was Mr. Mistovich as — I believe you said
[21] his title was assistant track engineer?
[22] A: Well, I said I wasn't sure, but I believed
[23] it was assistant division engineer, Track.
[24] Q: Was he considered management?

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[1] Q: And was that an MBCR employee?
[2] A: Yes, it was.
[3] Q: And did you have any discussions with Mr.
[4] Mistovich about that situation?
[5] A: We — I talked to a lot of people about
[6] that situation, and I'm sure that Mr. Mistovich was
[7] present during a lot of these discussions.
[8] Q: Do you recall the subject coming up that
[9] one of the problems or one of the factors that
[10] contributed to the death of that employee was the
[11] fact that they, MBCR, was shorthanded with track
[12] people?
[13] A: That was an allegation that was made.
[14] Q: Do you recall who made the allegation?
[15] A: No, I don't.
[16] Q: Do you ever remember being at a meeting
[17] with Mr. Mistovich and Mr. Lydon and, perhaps, other
[18] people where Mr. Mistovich informed Mr. Lydon that
[19] he thought that was the reason for the death?
[20] A: I don't remember those specific — that
[21] specific allegation being — coming from Mr.
[22] Mistovich to Mr. Lydon. This was a very emotional
[23] time. The loss of an employee is for us a — it's a
[24] tragedy, and it's understandable that emotions run

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[1] very high when that happens particularly in the
[2] department that it happens in. So it's very
[3] possible that statement that you referred to was
[4] made. I don't remember it being specifically made,
[5] but it's very plausible.
[6] Q: Okay. At any rate at some point in
[7] December of 2003 there was a decision to hire new
[8] track people, correct?
[9] A: Yes.
[10] Q: Did you participate in that decision-making
[11] process?
[12] A: Not in December of 2003.
[13] Q: Okay. How about prior to that?
[14] A: No, it would not have been my
[15] responsibility.
[16] Q: Okay. Do you know how many new track
[17] employees were approved to be hired in this time
[18] period?
[19] A: I don't know the specific number.
[20] Q: Now, in Exhibit 1, which you hadn't seen
[21] before, Mr. Mistovich had requested 30 new employees
[22] or 37 new employees. Do you recall that there was
[23] an approval of that many new employees?
[24] A: I don't believe that 37 would have been

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[1] approved.
[2] Q: Was it less than ten, if you recall?
[3] A: I don't know the number that was approved.
[4] Q: At any rate there were new employees hired
[5] in the Track Department, correct, after, let's say,
[6] in the first three months of 2004?
[7] A: We were in the process of hiring, yes.
[8] Q: Do you know how many were hired?
[9] A: I don't know the specific number.
[10] Q: Okay. Was it Ms. Leaton's function to
[11] screen the candidates who would be interviewing for
[12] hiring?
[13] A: Yes.
[14] Q: Do you know whether in this time period Mr.
[15] Mistovich provided any resumes of prospective
[16] candidates to Ms. Leaton?
[17] A: He probably did. I don't know
[18] specifically.
[19] Q: I'm only asking you your personal —
[20] MS. RUBIN: Yes, you shouldn't guess. You
[21] just should...
[22] A: I don't know specifically.
[23] Q: You may have an understanding based on
[24] something you've seen in the case, but my question

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[1] is what you knew around the time, if you had
[2] knowledge.
[3] A: I don't know specifically that he provided
[4] any.
[5] Q: Okay. Is it fair to say you don't know
[6] where the resumes came from that were reviewed for
[7] hiring back in this time period?
[8] A: That's fair to say.
[9] Q: Okay. Now, let me direct your attention to
[10] March 26th, 2004. Do you recall attending a meeting
[11] with Mr. Mistovich along with Elizabeth Bowden and
[12] Mr. Nevero?
[13] A: Yes, I do.
[14] Q: And do you recall who requested that you
[15] attend the meeting?
[16] A: The general manager.
[17] Q: Is that Mr. Lydon?
[18] A: Yes.
[19] Q: And do you remember what he said to you?
[20] A: There was an allegation that had been made
[21] about some questions in hiring practices and that a
[22] meeting was being held to investigate this
[23] allegation; and as Mr. Lydon's deputy and a senior
[24] officer of the company, he asked me to attend.

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[1] Q: Okay. And the other people at the meeting
[2] were Elizabeth Bowden and Stephen Nevero from MBCR
[3] besides Mr. Mistovich, correct?
[4] A: That is correct.
[5] Q: And do you know how they came to be present
[6] at the meeting?
[7] A: Well, Liz Bowden was the head of HR and
[8] Steve Nevero was the chief engineer. So you had the
[9] department head as well as the head of HR there.
[10] Q: Did you have any conversations with
[11] Elizabeth Bowden prior to the meeting about the
[12] subject matter of the meeting?
[13] A: Only that there was an allegation of an
[14] infraction of our hiring practices, our hiring
[15] policies.
[16] Q: Okay. You did have a conversation with
[17] her?
[18] A: (Nods head)
[19] Q: You have to say "yes."
[20] A: Yes.
[21] Q: Was this by telephone or face to face?
[22] A: This was when I was meeting with the
[23] general manager, Steve Nevero and Liz Bowden prior
[24] to the 26th when this meeting was going to be

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[1] scheduled.
[2] Q: So there was a meeting with Mr. Lydon
[3] attended by you, Ms. Bowden and Mr. Nevero?
[4] A: Correct.
[5] Q: And he assigned you to conduct this
[6] investigation; is that —
[7] A: To be a party to the investigation.
[8] Q: Do you recall any conversation at the
[9] meeting?
[10] A: Other than it was that we were — it was
[11] alleged that prospective candidates were being
[12] excluded from the hiring pool based on where they
[13] lived, and that's what we were to determine, if
[14] there was any truth to that allegation.
[15] Q: Do you remember who made that allegation?
[16] A: The allegation was attributed to Ms.
[17] Leaton.
[18] Q: And did you receive any information as to
[19] what the basis of the allegation was?
[20] MS. RUBIN: Objection. You mean prior to
[21] the meeting with —
[22] MR. TEAGUE: Yes.
[23] A: No.
[24] Q: And "at the meeting," I'm talking about the

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[1] initial meeting between you and Kevin Lydon where
[2] Mr. Mistovich was not present.
[3] A: At that meeting that's where the allegation
[4] was presented.
[5] Q: Do you remember about when that meeting
[6] occurred?
[7] A: Not more than a day or two before the March
[8] 26th meeting.
[9] Q: Were you shown any documents at this
[10] meeting with Mr. Lydon?
[11] A: No.
[12] Q: And prior to the March 26th meeting, were
[13] you shown any documents?
[14] A: No.
[15] Q: And prior to the March 26th meeting, did
[16] you talk to Mr. Mistovich about the purpose of the
[17] meeting?
[18] A: No.
[19] Q: Do you know if Ms. Bowden talked to Mr.
[20] Mistovich or provided any information to him about
[21] the reason for the meeting?
[22] A: I have no knowledge of that.
[23] Q: Okay. How about Mr. Nevero?
[24] A: Again, I don't know if he did or he didn't.

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[1] Q: Did you talk to Alison Leaton before the
[2] meeting?
[3] A: No.
[4] Q: Do you recall in your meeting with Mr.
[5] Lydon anyone suggesting that Mr. Mistovich be
[6] informed of the allegations prior to the meeting on
[7] March 26th?
[8] A: I don't remember if that was discussed.
[9] Q: Before this initial meeting with Mr. Lydon
[10] and Mr. Nevero and Ms. Bowden, were you aware of any
[11] criticism of MBCR from government officials for
[12] failure to hire minorities?
[13] A: Not prior to this meeting, no.
[14] Q: Now, where did the meeting take place?
[15] MS. RUBIN: Which meeting?
[16] Q: I'm sorry. Let me go back —
[17] MR. TEAGUE: You're correct.
[18] Q: — let me direct your attention to the
[19] March 26th meeting. This is the one that Mr.
[20] Mistovich was present. Where did it take place?
[21] A: 32 Cobble Hill Road, Somerville.
[22] Q: Is that the MBCR main office?
[23] A: That's an engineering office.
[24] Q: And what time of the day did the meeting

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[1] occur?
[2] **A:** Late in the afternoon.
[3] **Q:** And did you take any notes of the meeting?
[4] **A:** No, I did not.
[5] **Q:** Did you ever make a written summary of the
[6] meeting?
[7] **A:** I did.
[8] **Q:** And who was that addressed to?
[9] **A:** Our corporate counsel.
[10] **Q:** Let me ask you sitting here what you recall
[11] being said at the meeting, that is, who said what at
[12] the meeting. You don't have to use the exact words,
[13] but your best recollection of the substance of what
[14] was said.
[15] **A:** The meeting was conducted by Liz Bowden.
[16] She went over our equal opportunity policy and then
[17] asked if candidates were excluded from the hiring
[18] pool because of where they lived, and not based on
[19] their qualifications, but solely based on where they
[20] came from, in particular one candidate. Mr.
[21] Mistovich in a moment of candor said that that was
[22] true, and that he had had problems with these people
[23] in the past, implying that they were — that from
[24] where they came from, they were most likely minority

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[1] employees or minority candidates, and that he had
[2] files and records that he had difficulty with these
[3] people once they were hired.
[4] **Q:** He said that at the meeting?
[5] **A:** Yes, he did.
[6] **Q:** Did — was there a discussion of a
[7] particular candidate?
[8] **A:** There was a candidate who had — let me
[9] just back up for a second. A track employee, like
[10] many railroad employees, the basic requirement is
[11] that they have a high school education, and they're
[12] entry-level positions. If they bring a little more
[13] to the hiring officer, that would give them a leg
[14] up, all things being equal, and that would be
[15] something like some specialized training: CDLs,
[16] hoisting licenses, some welding skills. That gives
[17] them an advantage over anyone else, again, all
[18] things being equal.
[19] This particular candidate did have a CDL,
[20] which is useful to us because we have some fairly
[21] large trucks that have to be driven, and this
[22] candidate had been excluded from the interview pool.
[23] **Q:** In fact, the candidate had been hired; is
[24] that correct?

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[1] **A:** The candidate ultimately was hired.
[2] **Q:** Okay.
[3] **A:** But only at the insistence of the HR
[4] Department.
[5] **Q:** And do you remember the candidate's name?
[6] **A:** (Pause)
[7] **Q:** Well, did you look at the resume at the
[8] time?
[9] **A:** No, I didn't.
[10] **Q:** Okay. I'm just going to show you a copy of
[11] a document.
[12] **A:** (Reviewing document)
[13] **Q:** And was the candidate Marvin F. Morgan?
[14] **A:** I believe it was, yes.
[15] **Q:** So if I understand your testimony
[16] correctly, Mr. Mistovich at the meeting said that he
[17] was aware that Mr. Morgan was a minority candidate
[18] because of where he was from?
[19] **A:** Mr. Mistovich never said that.
[20] **Q:** Oh, okay.
[21] **A:** What he did was, he implied that he was a
[22] minority candidate because of where he was from.
[23] **Q:** Let me go back. I just want to get your
[24] recollection of what you recall Mr. Mistovich

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[1] saying, not maybe what you concluded from that or
[2] what you implied from that. What do you remember
[3] Mr. Mistovich saying actually?
[4] **A:** Basically that he didn't want to hire
[5] people from these areas because he had problems with
[6] them in the past.
[7] **Q:** He said words to that effect?
[8] **A:** To that effect.
[9] **MR. TEAGUE:** Okay. Why don't we mark this.
[10] This is my only — I only have one extra copy.
[11] **Q:** You can hang on to that.
[12] **MR. TEAGUE:** Why don't we mark the Morgan
[13] resume as Exhibit 2 for identification.
[14] (Document marked as Urban
[15] Exhibit 2 for identification)
[16] **Q:** Do you have any information as to how many
[17] people Mr. Mistovich hired during his employment at
[18] Amtrak?
[19] **A:** No, I don't.
[20] **Q:** Do you know whether or not he hired people
[21] at Amtrak from Dorchester?
[22] **A:** I don't know that.
[23] **Q:** Do you recall what else anyone said at this
[24] meeting?

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[1] A: The questions continued by Ms. Bowden, and
[2] Mr. Mistovich then only answered in one way, and
[3] that was "I try to hire the best, most qualified
[4] employee" virtually to every question until such a
[5] point where he stopped answering questions
[6] altogether; and Ms. Bowden made a statement to the
[7] effect of, you know, "By not answering we can only
[8] assume that this is true." There was no response to
[9] that. Ms. Bowden also said that Mr. Mistovich was
[10] stonewalling, in which Mr. Mistovich replied in
[11] referencing some benefits issues that he had with
[12] the HR Department. But it was clear to me that his
[13] initial response was in a moment of candor. In
[14] realizing what he had said, he then went to this, "I
[15] only hire the best and most qualified."
[16] Q: Did Mr. Mistovich ever say that he did not
[17] hire people because they were minorities?
[18] MS. RUBIN: Objection.
[19] Q: You may answer the question.
[20] MS. RUBIN: Right. I'm not telling you not
[21] to answer.
[22] THE WITNESS: Oh.
[23] A: No, he never said that.
[24] Q: Okay. Before or at the meeting, did anyone

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[1] make any inquiry into Mr. Mistovich's health?
[2] A: No.
[3] Q: Was any inquiry made as to whether he was
[4] taking any medication which might affect his mental
[5] condition?
[6] A: No.
[7] Q: Now, at the meeting — this was on March
[8] 26th, correct?
[9] A: Yes.
[10] Q: And the incident that arose if I understand
[11] correctly was an allegation that Ms. Leaton made
[12] that during the selection process Mr. Mistovich had
[13] indicated reluctance to hire people from these
[14] areas, referring to Mr. Morgan?
[15] A: Yes.
[16] Q: Do you know when the incident between Ms.
[17] Leaton and Mr. Mistovich occurred?
[18] A: No, I don't.
[19] Q: Do you know how long before March 26th it
[20] occurred?
[21] A: No, I don't know.
[22] Q: Do you know in that hiring process — well,
[23] let me go back a second. Was it your understanding
[24] that it was Ms. Leaton and Mr. Mistovich that were

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[1] involved in selecting resumes of candidates to be
[2] interviewed?
[3] A: Yes.
[4] Q: And do you know how many resumes Mr.
[5] Mistovich and Ms. Leaton reviewed?
[6] A: No, I don't.
[7] Q: Do you know how many candidates they
[8] interviewed for the job?
[9] A: No, I don't.
[10] Q: Do you know if — well, let me go back a
[11] step. Let me show you a document that was produced
[12] by your counsel in this proceeding. It's —
[13] MR. TEAGUE: I only have one extra copy.
[14] It's Bates stamped No. 1.
[15] Q: It appears to be e-mails between Elizabeth
[16] Bowden and Alison Leaton, and I ask you if you've
[17] seen this before.
[18] A: (Reviewing document) I have not seen this
[19] before.
[20] Q: Okay. Calling your attention to the —
[21] there's an e-mail, the top e-mail, from Alison
[22] Leaton to Liz Bowden dated Thursday, March 11, 2004,
[23] and that refers to a conversation that — in the
[24] first paragraph — Ms. Leaton had with Eli, which is

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[1] referred to as "late last week."
[2] A: Okay.
[3] Q: I assume would put it around March 4th or
[4] March 5th, the conversation.
[5] MS. RUBIN: Objection. You're asking him
[6] whether — he doesn't know.
[7] MR. TEAGUE: I haven't asked him a
[8] question. If you'll allow me ask my question —
[9] MS. RUBIN: Okay. Your voice went up, so
[10] it sounded like you were asking a question.
[11] MR. TEAGUE: I haven't asked it yet; so if
[12] you'll allow me to do that.
[13] Q: Looking at that does that refresh your
[14] recollection or understanding in any way of how long
[15] before the March 26th meeting the incident with Ms.
[16] Leaton and Mr. Mistovich occurred?
[17] A: The only knowledge I have is that it
[18] happened a few weeks prior. That's all.
[19] Q: So you knew it was maybe two or three weeks
[20] prior?
[21] A: It's very possible.
[22] MS. RUBIN: Objection. Do you know? You
[23] answered "it's possible."
[24] A: I have no direct knowledge of when the

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[1] interviews took place or when this — when the
[2] resumes were screened or anything that led up to the
[3] March 26th meeting, what the time frame was.
[4] **Q:** Did it — when the meeting of March 26th
[5] occurred, did Ms. Bowden make inquiry as to —
[6] specifically about Mr. Morgan?
[7] **A:** I think he was referred to as a candidate
[8] for employment.
[9] **Q:** Did it occur to you that Mr. Mistovich was
[10] having trouble recalling exactly what Ms. Bowden was
[11] talking about?
[12] **A:** No.
[13] **Q:** Did he recall the Morgan resume?
[14] **A:** Yes. Well, he recalled the candidate. I
[15] don't know specifically the resume, but...
[16] **Q:** Okay. Do you recall Mr. Mistovich making a
[17] comment to the effect of words something like, "It
[18] sounds like you've already made up your mind"?
[19] **A:** I don't recall that specific comment.
[20] **Q:** Did you consider that a fair way of
[21] approaching an allegation like this to Mr.
[22] Mistovich?
[23] **MS. RUBIN:** Objection.
[24] **A:** Yes, I did.

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[1] **Q:** What happened next after the meeting?
[2] **A:** There was —
[3] **Q:** Well, let me be more specific. The meeting
[4] was on March 26th?
[5] **A:** Yes.
[6] **Q:** I believe it was a Thursday? Do you recall
[7] the day of the week?
[8] **A:** I don't recall what day of the week it was.
[9] **Q:** So he was terminated on March 30th; do you
[10] recall that?
[11] **A:** Yes.
[12] **Q:** Between the March 26th meeting and March
[13] 30th, did you have conversations with Ms. Bowden or
[14] Mr. Nevero concerning the meeting?
[15] **A:** There was a conversation with Ms. Bowden,
[16] Mr. Nevero, Mr. Lydon and our counsel about the
[17] results of the interview process with Mr. Mistovich.
[18] **MS. RUBIN:** I'm just going to interrupt for
[19] a second here. This is a conversation that occurred
[20] in the presence of Rich Davey, who was general
[21] counsel for MassBay Commuter Rail. I'm going to
[22] allow him to testify about what was said during that
[23] meeting just as long as you are in agreement that
[24] that does not waive the attorney/client privilege as

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[1] to other communications that may have occurred in
[2] other settings.
[3] **MR. TEAGUE:** Okay. That's so agreed.
[4] **A:** We discussed what our findings were of the
[5] interview with Mr. Mistovich, and that's where —
[6] that's where it was determined Mr. Mistovich would
[7] be given the opportunity to either resign or we
[8] would terminate him.
[9] **Q:** Do you remember when this meeting with
[10] general counsel and Mr. Lydon took place?
[11] **A:** A few days after. It may have been the
[12] next day or the day after that.
[13] **Q:** And before the meeting had you had any
[14] conversations with Mr. Lydon or Mr. Nevero?
[15] **A:** No, I had not.
[16] **Q:** And how long did the meeting with Mr. Lydon
[17] and general counsel take?
[18] **A:** I don't remember. An hour.
[19] **MS. RUBIN:** Objection. Don't guess if you
[20] don't know.
[21] **A:** I don't know.
[22] **Q:** If you don't remember —
[23] **A:** I don't know.
[24] **Q:** Okay. Do you remember any specific

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[1] comments that were said at the meeting?
[2] **A:** The issue was discussed, the behaviors were
[3] discussed, how it impacted what our policies were
[4] and what course of action we should take, and those
[5] were the issues that were discussed at that meeting.
[6] **Q:** Did anyone make any comments that some
[7] action short of termination should be made?
[8] **A:** Yes.
[9] **Q:** And who made that — or who made those
[10] comments, if any?
[11] **A:** Mr. Nevero.
[12] **Q:** And what, if anything, did he say?
[13] **A:** He recommended or suggested that Mr.
[14] Mistovich be demoted and not be allowed to handle
[15] any hiring responsibilities.
[16] **Q:** And who was it that made the actual
[17] decision to terminate?
[18] **A:** That would be the responsibility of the
[19] general manager.
[20] **Q:** What, if anything, did you say at this
[21] meeting?
[22] **A:** I listened to the arguments on all sides,
[23] and I felt that based on what I knew, what the
[24] position of MBCR is or was, that the termination or

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[1] Q: Do you know how long Mr. Mistovich had
[2] worked for Amtrak or other railroad employers —
[3] A: No.
[4] Q: — prior to the termination?
[5] A: No, I don't.
[6] Q: Did you ever receive any information of
[7] that regard?
[8] A: No.
[9] Q: You were aware that he had worked at
[10] Amtrak's commuter rail service for what, about 1987?
[11] A: Yes.
[12] Q: Okay. Did anyone from MBCR review his
[13] personnel file there to determine his work history?
[14] MS. RUBIN: Objection. I mean, he's
[15] already testified that he didn't have the Amtrak
[16] personnel file.
[17] MR. TEAGUE: I'm not asking Amtrak.
[18] MS. RUBIN: Oh.
[19] Q: I'm asking if you reviewed the MBCR
[20] personnel file to determine how long he'd worked in
[21] the railroad system.
[22] A: I have no knowledge of that.
[23] Q: You didn't have those files with you at the
[24] meeting in which the termination decision was made;

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[1] is that correct?
[2] A: The files pertaining to his previous
[3] employment?
[4] Q: Yes.
[5] A: No.
[6] Q: Prior to the March 30th meeting, did you
[7] recall discussing anything about Mr. Mistovich's
[8] family situation?
[9] A: No.
[10] Q: Did anyone mention how many children he had
[11] or where he lived or anything like that?
[12] A: No.
[13] Q: Or prior to the termination decision, did
[14] anyone say anything favorable about Mr. Mistovich?
[15] MS. RUBIN: At any time in his employment
[16] or immediately at the termination?
[17] MR. TEAGUE: No.
[18] Q: I'm talking about the termination meeting,
[19] the decision between the March 26th meeting with Mr.
[20] Mistovich and then there was a second meeting with
[21] Mr. Lydon and counsel at which a decision to
[22] terminate was made. Any time prior to that decision
[23] to terminate, do you recall anyone making any
[24] favorable comments about Mr. Mistovich?

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[1] A: Other than Mr. Nevero stating that he would
[2] have — that he provided value to the organization,
[3] and that he would have liked to have seen him
[4] demoted and restricted from the hiring process.
[5] Other than that, no.
[6] Q: The termination decision was based solely
[7] on what — the conversation at that — as far as you
[8] were concerned, at that March 26th meeting, correct?
[9] A: I don't quite understand your question.
[10] Q: The decision to terminate Mr. Mistovich was
[11] based solely on the subject matter of the March 26th
[12] meeting, that would be Ms. Leaton's accusation and
[13] then your meeting with Mr. Mistovich?
[14] A: That is correct.
[15] Q: There were no other factors that anyone —
[16] A: No.
[17] Q: — brought to your attention?
[18] A: No, sir.
[19] Q: Now, after you told Mr. Mistovich his
[20] options to resign or be terminated, and he indicated
[21] that he would not resign; is that correct?
[22] A: That's correct.
[23] Q: Okay. And then did you personally — what
[24] happened next that you recall?

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[1] A: After he took the option of termination, I
[2] walked with him to his office to get his
[3] company-issued material. We had arranged for a
[4] private car service to take him home, because he had
[5] use of a company vehicle at that point, and helped
[6] him gather up his personal belongings and load them
[7] in the vehicle we had provided to bring him home.
[8] Q: And was this in the view of other employees
[9] at the facility?
[10] A: The — well, his office, of course, is a
[11] closed-in office. His car was parked outside in the
[12] parking lot. It's very possible that it could have
[13] been, yes.
[14] Q: Do you think it was embarrassing or do you
[15] consider it embarrassing for him to have been
[16] terminated in that fashion, walked out of the
[17] office?
[18] MS. RUBIN: Objection.
[19] A: It was a termination. That's all I have to
[20] say.
[21] Q: Okay. How did Mr. Mistovich appear to take
[22] the decision?
[23] A: He was angry.
[24] Q: Did he say anything to you after the

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[1] meeting?
[2] **A:** We spent quite a bit of time together after
[3] that in gathering up all his stuff and the stuff
[4] that was in his truck. We probably spent 45 minutes
[5] to an hour —
[6] **Q:** Uh-huh.
[7] **A:** — you know, gathering up his personal
[8] belongings and loading them into the other car. He
[9] was in shock that this had happened.
[10] **MS. RUBIN:** Again, I just want to
[11] interrupt. You should only talk about what you
[12] observed, what — not put your own —
[13] **MR. TEAGUE:** He can give — if he appeared
[14] to be in shock —
[15] **A:** He was angry. He was angry.
[16] **Q:** Did he appear to be shocked by the
[17] decision?
[18] **A:** He was.
[19] **Q:** Do you remember anything he said?
[20] **A:** Other than he couldn't believe that this
[21] had happened to him.
[22] **Q:** And did you say anything —
[23] **A:** No.
[24] **Q:** — in this conversation? I'm going to show

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[1] you a document which your client or your counsel
[2] provided in the case or which actually MBCR
[3] provided, Bates stamped No. 18, and it's called
[4] "MBCR Training Department"; and under the name "Eli
[5] Mistovich," it appears to have various training
[6] courses. Have you ever seen this document before?
[7] **A:** Not this specific one, no.
[8] **Q:** Okay. Do you know what it is?
[9] **A:** Appears to be a record of training.
[10] **Q:** Okay. If you look down in the record, it
[11] appears to show training going back to at least
[12] 1996. "June 5th, 1996," is the first entry, which
[13] is when Mr. Mistovich worked at Amtrak, correct?
[14] **A:** Yes.
[15] **Q:** So this would be a summary of his training
[16] at Amtrak, and then the bottom entry seems to
[17] indicate training at MBCR?
[18] **A:** Yes.
[19] **Q:** Do you know who assembled this document?
[20] **A:** No.
[21] **Q:** If you look about — at the halfway down
[22] there's an entry, "May 1st, 2000." It says
[23] "Diversity." It indicates there was a 16-hour
[24] training program provided to Mr. Mistovich at

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[1] Amtrak. Did that ever come to your attention
[2] before?
[3] **A:** That Mr. Mistovich had attended this
[4] training?
[5] **Q:** Or that there was at least a record of it
[6] by MBCR?
[7] **A:** No.
[8] **Q:** Okay. Then there was — about the fifth
[9] line up from the bottom, there's an entry "Human
[10] Resources Orientation, October 6, 2003," which is
[11] when he would have worked for MBCR, correct?
[12] **A:** Yes.
[13] **Q:** And that there was a four-hour orientation
[14] on that?
[15] **A:** Yes.
[16] **Q:** Do you know what that consisted of?
[17] **A:** Yes.
[18] **Q:** And what did that consist of?
[19] **A:** We did, for all employees regardless of how
[20] long they had been employed in the railroad
[21] industry, MBCR did an eight-hour course on MBCR
[22] values, goals, policies, procedures, who we were,
[23] where we were going, and what we expected of our
[24] employees.

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[1] **Q:** And was the diversity policy of MBCR
[2] discussed at that —
[3] **A:** Yes.
[4] **Q:** — meeting? Do you recall anyone prior to
[5] Mr. Mistovich's termination discussing the effect
[6] that a termination would have on his railroad
[7] retirement benefits?
[8] **A:** I don't believe that was discussed.
[9] **Q:** When you — were you aware of Mr.
[10] Mistovich's educational background?
[11] **A:** No, I wasn't.
[12] **Q:** Do you have any understanding of whether he
[13] had an engineering degree?
[14] **A:** I don't know.
[15] **Q:** Let me go back to your meeting of March
[16] 26th when — if I recall correctly, you testified
[17] that Mr. Mistovich made comments about — I'm
[18] paraphrasing what you said — about the location or
[19] the place a person lived indicated on the resume
[20] would make — would be some indication to him he
[21] would have difficulties with the person?
[22] **A:** Yes.
[23] **Q:** And that you concluded that that was an
[24] indication of some kind of racial bias, I take it?

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- [1] A: Yes.
- [2] Q: Did you consider that to be a strange
- [3] subject for someone of Mr. Mistovich's background to
- [4] make?
- [5] MS. RUBIN: Objection.
- [6] A: I actually thought it was strange to be
- [7] made in this day and age particularly given that the
- [8] history of railroad hiring and the amount of
- [9] training that we had gone through. If I may?
- [10] Q: Sure.
- [11] A: Amtrak as well as the MBTA had been under
- [12] years of pressure because of discriminatory hiring
- [13] practices. Amtrak was served with a class action
- [14] suit by minority candidates particularly in the
- [15] Track Department because they were excluded from
- [16] positions. The training that we went through as
- [17] Amtrak officers was very intensive and fairly
- [18] regular into how we were supposed to behave in
- [19] compliance with the federal law about hiring.
- [20] So to answer your question, given the
- [21] training that we had had, it was. That anyone in
- [22] this day and age would even think in those terms is
- [23] strange.
- [24] Q: And at Amtrak did you have any hiring

- [1] MR. TEAGUE: Let me just take a moment to
- [2] confer with Mr. Mistovich. I'll be back.
- [3] MS. RUBIN: Okay.
- [4] (Brief recess)
- [5] MR. TEAGUE: I just have a few more
- [6] questions, so if you just want to go ahead, I'll be
- [7] finished in a couple of minutes.
- [8] MS. RUBIN: Okay. Great.
- [9] BY MR. TEAGUE:
- [10] Q: Let me go back to a couple of points we
- [11] discussed earlier, Mr. Urban. If any — you did
- [12] mention early on there were some discussions after
- [13] the death of an employee as to — in the snowstorm?
- [14] A: Yes.
- [15] Q: Do you recall having any discussions or
- [16] hearing Mr. Lydon make any remarks to the effect
- [17] that he took exception to anything Mr. Mistovich
- [18] said in connection with that incident?
- [19] A: I don't recall anything like that.
- [20] Q: Now, between the July of '03 and the
- [21] present, I believe you testified that MBCR has hired
- [22] well over 100 new employees, correct?
- [23] A: Yes.
- [24] Q: Have you had any complaints from any

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- [1] responsibilities?
- [2] A: Yes, I did.
- [3] Q: And, in fact, do you receive performance
- [4] evaluations —
- [5] A: Yes, I did.
- [6] Q: — working at Amtrak, did you not?
- [7] A: Yes.
- [8] Q: In your performance evaluation was your
- [9] diversity in hiring one of the categories in which
- [10] you were evaluated?
- [11] A: Yes, absolutely. Every manager had that.
- [12] Q: So that was a very important subject at
- [13] Amtrak?
- [14] A: Yes, it was.
- [15] Q: So would it be reasonable to infer that Mr.
- [16] Mistovich had the same experience at Amtrak that you
- [17] had?
- [18] A: Yes.
- [19] MS. RUBIN: Objection.
- [20] THE WITNESS: Oh, sorry.
- [21] Q: Did you say anything to Mr. Mistovich about
- [22] how you felt it was strange that he would make this
- [23] comment?
- [24] A: No.

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- [1] government agency about failing to hire a sufficient
- [2] number of minorities?
- [3] A: There is an ongoing issue with Councilman
- [4] Turner.
- [5] Q: Is that a Boston City Councilor?
- [6] A: Boston City Councilor.
- [7] Q: Would you describe what that issue is.
- [8] A: Well, he thinks we should turn around our
- [9] entire workforce. It is a political issue with him,
- [10] it has been since the Amtrak days, and how it
- [11] relates to the MBTA hiring. That's an ongoing issue
- [12] with Councilman Turner. We have not been cited by
- [13] any federal agencies. There have been no — if
- [14] that's what you mean?
- [15] Q: Yes.
- [16] A: No.
- [17] Q: How about the Massachusetts Commission
- [18] Against Discrimination?
- [19] A: There are employees that bring cases before
- [20] MBCR at the MCAD, yes, there is.
- [21] Q: Have any cases been brought for
- [22] discrimination in hiring as opposed to termination?
- [23] A: I don't know specifically.
- [24] Q: Okay. Do you know about how many cases

Exhibit E